NOTES

BETTER SEEN THAN HERDED: RESIDENCY RESTRICTIONS AND GLOBAL POSITIONING SYSTEM TRACKING LAWS FOR SEX OFFENDERS

"We don't want anybody moving to town that is of that persuasion."
– Brick, N.J. Mayor Joseph C. Scarpelli[1]

"[W]hen you become a Level 3 sex offender, you give up all rights as a citizen."
– St.Paul City Council President Kathy Lantry[2]

"[They] deserve stigmatization." – Chief Justice William H. Rehnquist[3]

"What is more logical? Putting us out on the run or keeping us here under supervision?" – New York state sex offender Raymond Anderson[4]

I. INTRODUCTION.

Sexual predators are some of the most feared and despised criminal offenders in society. They are considered so beyond cure that laws must restrict their freedom because "[t]hey can't help themselves."[5] Their crimes are "so offensive to human dignity and so atrocious that many [citizens] would be comfortable using any

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[1] Robert F. Worth, *Exiling Sex Offenders from Town; Questions About Legality and Effectiveness*, N.Y. TIMES, Oct. 3, 2005, at B1.

[2] Jason Hoppin, *St. Paul Wants to Use GPS to Track Homeless Sex Offenders; City Would Be First in State to Band Unsupervised Level 3 Convicts with Ankle Monitor*, ST. PAUL PIONEER PRESS, Jan. 6, 2006, at 1A.

[3] Gina Holland, *Justices Confront Challenges to Sex Offender Laws; Posting Convicted Sex Offenders' Pictures on the Internet Called a Second Punishment*, SAN MATEO COUNTY TIMES, Nov. 14, 2002, at A1.

[4] Charles Laurence, *Mayor Defends Law to Run Child-Sex Offenders Out of Town*, SUNDAY TELEGRAPH (London), May 29, 2005, at 26.

[5] Worth, *supra* note 1, at B1.

means necessary to prevent even the possibility of re-offense."[6] Severe sex offender laws thwart any attempt an offender makes to seek treatment, keeping them from assimilating into society and developing a normal life.[7] However, no studies on these laws show that they actually reduce the number of sex offenses or the recidivism of previous sexual predators.

Courts usually uphold sex offender laws as constitutional, "justified by the state's interest in preserving public safety."[8] However, local and state assemblies are currently considering a new generation of sex offender laws of questionable constitutionality. Local governments are passing laws that place residency restrictions on previous offenders so that they cannot reside or, in some cases, be, within a certain distance of "schools, school bus stops, day-care centers, parks, playgrounds or other places where youngsters congregate."[9] In addition, legislatures are attempting to implement programs that would actively track sex offenders through a global positioning system (GPS). California Governor Arnold Schwarzenegger recently proposed such a plan, which would require "all registered sex offenders to wear a GPS device for life and to pay for it if they are able."[10] The Supreme Court will soon consider the constitutionality of these laws.[11]

Courts usually uphold the various generations of legislation as constitutional because they consider the protection of society to be an adequate reason to impose these limitations and do not consider the infringements upon the offender to be punishment.[12] With the advent of new laws imposing residency restrictions and requiring sex offenders to wear GPS devices, it is important to evaluate whether this new generation of sex offender laws represents enough of a step in the right direction to justify the major infringement upon constitutional rights that these laws effect. Implementing laws that work, not just those which impose excessive and fruitless restrictions, should be the legislatures' critical priority; in this situation, *more* does not equal *better*. While courts reviewing residency restrictions should overturn them for constitutional reasons,[13] GPS tracking is a promising program to protect both society and offenders within constitutional boundaries.

This current trend of tightening sex offender laws is a response to "residents' fears of sex offenders in a nation bombarded with news reports about the kidnapping, rape, and murder of children by sexual predators."[14] As legislators

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[6] Doe v. Miller, 298 F. Supp. 2d 844, 846 (S.D. Iowa 2004), *rev'd*, 405 F.3d 700 (8th Cir. 2005).

[7] *See* discussion *infra* Part III.A.

[8] Worth, *supra* note 1, at B1.

[9] John-Thor Dahlburg, *Limits on Sex Offenders Spread in Florida; Communities are Passing Laws to Keep Predators Away from Children. But Some Say the Crackdowns May be Ineffective or Illegal*, L.A. TIMES, July 5, 2005, at A13.

[10] Jake Henshaw, *Bill Would Increase Penalties, Monitoring*, THE CALIFORNIAN, Aug. 17, 2005, at 2A.

[11] *See* discussion *infra* Part III.A.

[12] *See* discussion *infra* Part IV.A.

[13] *See* discussion *infra* Part IV.

[14] Darryl McGrath, *Restrictive Law Makes N.Y. City Off-Limits to Sex Offenders; Many*

react to "horrific and well-publicized cases" where children were murdered by registered sex offenders,[15] other communities react similarly "to appease public anger and to assure the people that the government would do whatever was necessary to make them safe;"[16] "[n]o one ever lost votes going after sex offenders."[17] Recidivism rates for other criminal offenders are higher,[18] but society legislates with a focus upon the small, but violent and pedophilic faction of offenders, who "have recidivism rates of more than 50 percent, and do not tend to respond to treatment."[19] In reality, only 13.4% of sex offenders recidivate within four to five years, with 22% of rapists and only 10% of child molesters recidivating with a violent offense.[20] In comparison, drug offenders recidivate at a rate of about 25%, and violent offenders at 30%.[21] As Howard Finkelstein, public defender for Broward County, Florida, noted, "[i]t's politicians trying to get to the microphone quickest so they can announce to the world that they are against sex offenders."[22]

Behind the passage of increasingly stringent laws, however, are the latent negative effects that the laws have on both sex offenders and the public. Sex offenders are denied the protection of the Fair Housing Act,[23] so housing is not easily available to them; residency restrictions will only heighten this burden. Also, although published sex offender "information does not give a community the right to harass an offender,"[24] that has been the consequence.[25] Aside from

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States Grapple With Tighter Controls, THE BOSTON GLOBE, Aug. 22, 2005, at A3.

[15] Worth, *supra* note 1, at B1.

[16] Bruce J. Winick & John Q. LaFond, *Introduction* to PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS: LAW, JUSTICE, AND THERAPY 5, (Bruce J. Winick & John Q. LaFond eds., 2003).

[17] Patt Morrison, *Brainless Laws, Gutless Pols*, L.A. TIMES, Nov. 16, 2006, at A31.

[18] *See* JOHN Q. LAFOND, PREVENTING SEXUAL VIOLENCE: HOW SOCIETY SHOULD COPE WITH SEX OFFENDERS 46 (2005).

[19] Worth, *supra* note 1, at B1.

[20] *See* R. Karl Hanson, *Who Is Dangerous and When Are They Safe? Risk Assessment With Sexual Offenders*, *in* PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS, *supra* note 16, at 64.

[21] Pamela D. Schultz, *Treatment For Sex Offenders Can Protect Community; But the Problem of Readmitting Perpetrators to Society Will Never be Solved If We Allow Misplaced Fear and Paranoia to Guide Us*, NEWSDAY, Dec. 3, 2006, at A60.

[22] Dahlburg, *supra* note 9, at A13.

[23] *See* Phil Davis, *In Small City, Sex Offender "Buffer Zone" Looks More Like a Ban*, ST. PETERSBURG TIMES, Aug. 28, 2005, at 1. The Fair Housing Act "prohibits discrimination by direct providers of housing . . . because of: race or color; religion; sex; national origin; familial status; or disability." U.S. Dep't of Just., The Fair Housing Act, http://www.usdoj.gov/crt/housing/housing_coverage.htm (last visited June 22, 2007). These are the only classes protected by the Act; "[c]urrent users of illegal controlled substances, persons convicted for illegal manufacture of distribution of a controlled substance, sex offenders, and juvenile offenders are not considered disabled under the Fair Housing Act, by virtue of that status. *Id.*

[24] Indrani Sen, *The Molester Next Door; His Life Among Neighbors Who Abhor Him*, NEWSDAY, Oct. 28, 2005, at A8.

persecution of sex offenders, "[n]umerous problems have occurred, including, among others, innocent families being harassed, victims of sexual abuse being identified, and private residences of law-abiding citizens [mistakenly] being posted on registries and the Internet as the residences of sex offenders."[26] An innocent man lost four teeth when four men beat him because they mistakenly "thought he was a pedophile because his address was listed in the state's sex-offender registry."[27] Experts admit that the laws could drive sex offenders away from sources of stability for them, possibly leading to a greater risk of recidivism.[28]

The Supreme Court will soon have to decide whether these laws are too restrictive. Literature suggests that when the Supreme Court finally reviews these residency restrictions, the Court will, or rather, *should*, find them unconstitutional under the Ex Post Facto Clause.[29] Thus far, the Court has not analyzed GPS monitoring devices for sex offenders to determine their constitutionality.[30]

This Note expands upon prior residency restriction analysis and argues that residency restrictions should be overturned as unconstitutional based not only upon the Ex Post Facto Clause, but also on substantive due process, procedural due process, and equal protection arguments. GPS monitoring devices, however, should be upheld as constitutional, as analyzed under the above arguments: while the devices intrude upon many private rights and interests of an individual, when balanced against the government's overarching interest in safety, sex offenders are so despised a class that society's interest will prevail.[31]

Part II of this Note provides a brief history of the United States' sex offender laws that are becoming increasingly stringent and infringe on constitutional rights without any indication that the laws are rehabilitative or preventative. Part III expounds the new generation of sex offender laws—residency restrictions and GPS

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[25] *See e.g.*, Alex Lyda, *Vigilante Beating Raises Questions about Texas Sex-Offender Registry*, DESERET NEWS, Nov. 4, 1999, at A2.

[26] Robert E. Freeman-Longo, *Revisiting Megan's Law and Sex Offender Registration: Prevention or Problem*, *in* SEXUAL VIOLENCE: POLICIES, PRACTICES, AND CHALLENGES IN THE UNITED STATES AND CANADA 224 (James F. Hodgson & Debra S. Kelley eds., 2002).

[27] Lyda, *supra* note 25, at A2.

[28] Worth, *supra* note 1, at B1.

[29] Bret R. Hobson, *Banishing Acts: How Far May States Go to Keep Convicted Sex Offenders Away From Children?* 40 GA. L. REV. 961, 990 (2006).

[30] John S. Ganz, *It's Already Public: Why Federal Officers Should Not Need Warrants to Use GPS Vehicle Tracking Devices*, 95 J. CRIM. L. & CRIMINOLOGY 1325 (2005). Courts have only ruled on the constitutionality of GPS devices with regard to their usage on suspects' cars and the necessity of a warrant for that placement under the Fourth Amendment. *Id.*; Marisa L. Mortensen, *GPS Monitoring: An Ingenious Solution to the Threat Pedophiles Pose to California's Children*, 27 J. JUV. L. 17, 31–32 (2006). Commentators have noted GPS devices as a possibility for the future of sex offender laws but have not applied constitutional challenges to their application. *See* Ganz, *supra*; Mortensen, *supra*.

[31] *See* Philip Ewing, *Sex Predators Would Be Tracked for 40 Years; Of the 1,100 Sexual Offenders Now on Parole in Illinois, the New System Would Apply to About 120 Who are Currently Monitored*, ST. LOUIS POST-DISPATCH, Feb. 9, 2006, at D8.

provisions—currently being enacted, and Part IV applies constitutional challenges to the new laws. Part V then concludes that, under the Ex Post Facto, substantive due process, and procedural due process clauses of the Constitution, residency restrictions are unconstitutional and should be overturned, but GPS laws should be upheld.

II. BRIEF EVOLUTION OF SEX OFFENDER LAWS.

California introduced the first sex offender registration law in 1947,[32] but few states enacted similar legislation until the 1990s.[33] In 1994, under the Jacob Wetterling Act, the first national registration law was enacted.[34] Named after a still-missing kidnapped boy,[35] the Act mandated that states require child molesters and violent predators to register and provide police with their addresses for ten years or until they were deemed no longer a sexually violent predator (SVP).[36] If a state failed to comply, it would lose 10% of its Byrne Grant funds.[37] Registration requirements vary by state, but generally include:

> name and any aliases, address, date of birth, social security number, photograph and/or physical description, fingerprints, the type of offense the person was convicted of, the age of the victim, the date of conviction, the punishment received, any vehicles registered to the offender, and the place of employment or school. A few jurisdictions also require that the sex offender provide a blood sample for DNA evidence.[38]

In mid-2005, "the federal government linked the online registries of nearly two dozen participating states and the District of Columbia to one website managed by the Department of Justice,"[39] consolidating the various registries and making them available to Internet users.[40]

Megan's Law was the first amendment to the Jacob Wetterling Act;[41] passed in

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[32] *See* Suzette Cote, *Megan's Law in California: The CD-ROM and the Changing Nature of Crime Control*, *in* SEXUAL VIOLENCE, *supra* note 26, at207.

[33] Elizabeth A. Pearson, *Status and Latest Developments in Sex Offender Registration and Notification Laws*, *in* NATIONAL CONFERENCE ON SEX OFFENDER REGISTRIES 45 (U.S. Bureau of Justice Statistics, ed., 1998), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/ncsor.pdf.

[34] 42 U.S.C. § 14071. *See also* Lisa Gursky Sorkin, *The Trilogy of Federal Statutes*, *in* NATIONAL CONFERENCE ON SEX OFFENDER REGISTRIES, *supra* note 33, at 16.

[35] *See* Freeman-Longo, *supra* note 26, at 223.

[36] *See* Gursky Sorkin, *supra* note 34, at 16–17. "The Edward Byrne Memorial State and Local Law Enforcement Assistance Program . . . provides formula grants to States to improve the functioning of the criminal justice system." Marlene Beckman, *Panel Introduction*, *in* NATIONAL CONFERENCE ON SEX OFFENDER REGISTRIES, *supra* note 33, at 15.

[37] *Id.*

[38] KAREN J. TERRY & JOHN S. FURLONG, SEX OFFENDER REGISTRATION AND COMMUNITY NOTIFICATION: A "MEGAN'S LAW" SOURCEBOOK I-8 (2d ed. 2004).

[39] McGrath, *supra* note 14, at A3.

[40] *Id.*

[41] *See* Freeman-Longo, *supra* note 26, at 223. "Megan's Law was named after Megan

1996, the Law "mandated all states to develop notification protocols that allow public access to information about sex offenders in the community."[42] Although some states restrict registry information to law enforcement, in the majority of states, "the degree and method of notification depend on offenders' placement in one of several tiers, reflecting the degree of risk and reoffending that they are thought likely to present."[43] Depending upon their tier classification, information may be disseminated to individuals "who may encounter a sex offender."[44] The information is distributed to schools and other child-service organizations, or to the public generally, by the police or the sex offender or by request through a notification hotline or through the Internet.[45] For example, the state of Washington authorizes disclosure to the general public for level III (high risk) offenders, to schools and day care providers for level II (moderate risk) offenders, and to law enforcement only for level I (low risk) offenders.[46]

In addition to registration and notification laws, a few states have more severe laws pertaining to sex offenders considered more dangerous. A minority of states have used, albeit rarely, sex offender commitment statutes[47] requiring post-sentence civil commitment of offenders determined to be a sexually violent predator (SVP).[48]

A few states also use antiandrogens, drugs with "the same sex-drive-reducing effects as surgical castration,"[49] as a way to control male sex offenders. In 1996, California enacted a law that requires second-offense sex offenders to be chemically or surgically castrated as a condition of parole;[50] if the offender refuses, he will serve the rest of his sentence in prison.[51] Other states[52] have passed similar

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Kanka, a seven-year-old girl who was raped and murdered by a twice convicted child molester in her New Jersey neighborhood." *Id.*

[42] *Id.*

[43] Bruce J. Winick, *A Therapeutic Jurisprudence Analysis of Sex Offender Registration and Community Notification Laws*, *in* PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS, *supra* note 16, at 214.

[44] Bill Sanderson, *Non-Residents Are Subject to Megan's Law*, THE RECORD (Hackensack, N.J.), Feb. 10, 1996, at A3.

[45] *See* TERRY & FURLONG, *supra* note 38, at I-12.

[46] LAFOND, *supra* note 18, at 92. *See also* WASH. REV. CODE § 4.24.550 (West 2005).

[47] *See* LAFOND, *supra* note 18, at 132.

[48] *See* W. Lawrence Fitch & Debra A. Hammen, *The New Generation of Sex Offender Commitment Laws: Which States Have Them and How Do They Work?*, *in* PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS, *supra* note 16, at 28. Sexually violent predators are defined in Washington as a sex offender with "a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility." WASH. REV. CODE § 71.09.020(16) (West 2005).

[49] LAFOND, *supra* note 18, at 72.

[50] *See* CAL. PEN. CODE § 645 (West 2005).

[51] *See* LAFOND, *supra* note 18, at 174.

[52] *See* FLA. STAT. ANN. § 794.0235 (West 2005). *See also* MONT. CODE ANN. § 45-5-512 (2005); OR. REV. STAT. ANN. § 144.624 (West 2003).

laws requiring "courts or parole boards to condition probation, parole, or suspended sentences on selected sex offenders taking these drugs."[53]

With myriad sex offender laws, states and localities choose which sex offender laws to adopt. The effectiveness of any of these laws is questionable as society remains frustrated that sex offenses continue, sex offenders recidivate, and "[a]n estimated 100,000 of the 500,000 offenders on state registries aren't where they claim to be."[54] In a frustrated attempt to calm an anxious public, the U.S. House of Representatives recently passed the Children's Safety Act of 2005, requiring sex offenders to "verify their registry addresses in person every six months, or face five-year prison terms."[55] The questionable constitutionality of the new generation of sex offender laws permitting residency restrictions and GPS satellite monitoring requires state legislatures to prudently determine which laws and restrictions promise actual control of sex offenders and which only violate sex offenders' constitutional rights.

III. THE NEW GENERATION: RESIDENCY RESTRICTIONS AND GPS TRACKING.

A. Residency Restrictions.

In an effort to prevent sex offenders from recidivating, states first began passing residency restriction laws almost a decade ago to keep sex offenders away from children.[56] For example, an Iowa law prohibits a sex offender from residing "within two thousand feet of a[n] . . . elementary or secondary school or a child care facility."[57] Other states enlarge the distance to two thousand five hundred feet, almost half a mile, and additionally ban sex offenders from parks, school bus stops, and playgrounds.[58] Landlords within the restricted areas are prohibited from renting to sex offenders;[59] some localities, however, allow sex offenders already living within restricted areas to remain.[60] Sex offenders who violate the laws can be "fined $500 or jailed for 60 days; a second offense carries a fine of as much as $1,000 and a maximum jail sentence of 12 months."[61]

The first local residency restriction laws appeared early in 2005.[62] "Unlike their

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[53] LAFOND, *supra* note 18, at 175–76.

[54] Oliver Pritchard, *10 Years into Megan's Law: Offenders Still Slip Through*, PHILA. INQUIRER, Oct. 23, 2005, at A16.

[55] *Id.*

[56] *See* Worth, *supra* note 1, at B1.

[57] IOWA CODE ANN. § 692A.2A(2) (West 2005).

[58] *See* Dahlburg, *supra* note 9, at A13. *See also* Jordan Rau, *A Bid to Toughen Stance on Sex Offenses*, L.A. TIMES, Feb. 19, 2006, at B14.

[59] *See* Dahlburg, *supra* note 9, at A13.

[60] *See* Cynthia Daniels, *Huntington OKs Sex Offender Law*, NEWSDAY, Oct. 20, 2005, at A14.

[61] Dahlburg, *supra* note 9, at A13.

[62] Worth, *supra* note 1, at B1.

state counterparts, [these laws] often bar offenders from working or even being in the restricted areas—a modern-day sentence of exile."[63] It is "illegal for a sex criminal to drive through Binghamton, [New York] as its intersecting highways pass through forbidden zones."[64] Ely, Iowa also "passed an ordinance banning sex offenders from residing in nearly the entire town," despite the fact that not a single school or day care exists within town lines.[65] Miami Beach has passed similar legislation, and Tampa is considering the same.[66] California has proposed banning sex offenders from living within two thousand feet of parks and schools, which would prohibit offenders from residing in half of the Sacramento urban area, nearly seventy percent of the San Francisco Bay area, and approximately three-quarters of the Los Angeles metro area.[67] Clearly, residency restrictions are becoming pandemic.

Some members of the public may feel more protected by these residency restrictions.[68] Based on the belief that sex offenders do not respond to treatment, society tries to keep sex offenders far away from the population.[69] Opportunity and accessibility play a large role determining whether a sex offender reoffends, and these laws attempt to limit both.[70]

Critics of the residency restrictions, however, worry that the laws give communities a false sense of security[71] and are "unlikely to make towns and cities safer, and could even be harmful."[72] A lawyer for the Ohio Justice and Policy Center in Cincinnati noted that "restrictions on where sex offenders can live or travel do little to protect children because children most often are molested by someone they know well, a family member or trusted friend."[73] In fact, a 2000 Bureau of Justice study reveals that in cases of sexual assault of juveniles under

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[63] *Id.*

[64] James Bone, *Sex Offenders Fight Bylaw Banishing Them from Town: "Carousel Capital of World" Finds Itself in Legal Battle with Rapists, Child Abusers*, OTTAWA CITIZEN, Aug. 25, 2005, at A8.

[65] Press Release, American Civil Liberties Union, ACLU Asks U.S. Supreme Court to Review Iowa's Sex Offender Residency Restriction (Sept. 29, 2005), http://www.aclu.org//crimjustice/gen /20127prs20050929.html.

[66] Chuck Strouse, *The Doctor Part 1; He's Accused of Child Abuse. But Slow Down Folks. Think It Over*, MIAMI NEW TIMES, Jan. 25, 2007, *available at* http://www.miaminewtimes.com/2007-01-25/news/the-doctor-part-1/.

[67] *See* Jim Miller, *Jessica's Law: Effort to Keep Abusers Away; Zoning Out Sex Offenders; Proposal Would Ban Them From Living in Many Urban Areas*, SACRAMENTO BUREAU/THE PRESS-ENTERPRISE, Jan 1, 2006, at A1.

[68] *See, e.g.*, Kelly Wheeler, *Local Officials Make Final Push to Get Sex Offender Initiative on Ballot*, CITY NEWS SERVICE (San Diego), Feb. 6, 2006.

[69] Worth, *supra* note 1, at B1.

[70] Mark Rollenhagen, *Suburbs Ban Sex Offenders in Parks; Brook Park Trying to Make City Safe for Kids, Mayor Says*, THE PLAIN DEALER (Cleveland, Ohio), Sept. 28, 2005, at B1.

[71] *See id.*

[72] Worth, *supra* note 1, at B1.

[73] Rollenhagen, *supra* note 70, at B1.

eighteen, 92.9% of the victims are assaulted by a family member or acquaintance.[74] The study shows that even in adult sexual assault cases, the assaulter is a family member or acquaintance 72.6% of the time.[75] Additionally, an Idaho study showed that of the child sexual abuse cases filed in 2005, less than two percent involved abuse by a stranger.[76]

Aside from being ineffective, laws restricting residency are detrimental; "[d]octors who work with sex offenders say it's in society's best interest not to heap more stigma onto an already-demonized population."[77] Due to residency restrictions, sex offenders essentially become homeless[78] and bounce "from one community to the next, setting off a competitive spiral of ever-tougher 'not in my backyard' ordinances."[79] Without a stable home environment to aid the incorporation of societal values and support integration back into society, these "laws could drive some sex offenders out of sight . . . putting them at greater risk of committing more crimes."[80] The restrictions push offenders away from jobs, family, and treatment, and eliminate ties to the community; as one sex offender noted: faced with being uprooted, "[j]ust to survive, [he'll] have to change [his] identity and go on the run."[81]

In 2004, the U.S. District Court for the Southern District of Iowa invalidated the state law prohibiting a sex offender from living within two thousand feet of a school or day care.[82] The court ruled that the law violated the "Ex Post Facto Clause of the United States Constitution," infringed upon an individual's "Fourteenth Amendment rights to substantive and procedural due process," and "unconstitutionally require[d] sex offenders living in violation of the law to provide incriminating testimony against themselves in violation of the Fifth Amendment."[83] District Court Judge Pratt listed the right to "decide where and with whom family members will live," the "fundamental right to interstate and intrastate travel," and an individual's liberty interest[84] as sufficient reasons to hold the law unconstitutional. Additionally, the opinion stated that "'[t]here is no evidence . . .

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[74] *See* HOWARD N. SNYDER, NAT'L CTR. FOR JUVENILE JUSTICE, NIBRS STATISTICAL REPORT: SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT, AND OFFENDER CHARACTERISTICS 10 (U.S. Bureau of Justice Statistics, ed., 2000), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/saycrle.pdf.

[75] *See id.*

[76] *See* Shawna Gamache, *Most Victims Know Abusers*, THE IDAHO STATESMAN, Jan. 21, 2006, at 4.

[77] Sonia Krishnan, *Issaquah Wants to Limit Where Sex Offenders Live; Plan Essentially Would Keep Them Out of Neighborhoods*, THE SEATTLE TIMES, Aug. 11, 2005, at A1.

[78] *See id.*

[79] Worth, *supra* note 1, at B1.

[80] *Id.*

[81] *See* Laurence, *supra* note 4, at 26.

[82] Doe v. Miller, 298 F. Supp. 2d 844, 846 (S.D. Iowa 2004), *rev'd*, 405 F.3d 700 (8th Cir. 2005).

[83] *Id.* at 878.

[84] *Id.* at 874–75, 878.

that residential proximity to schools or parks affects re-offense.'"[85]

Judge Pratt's ruling was overturned by the Court of Appeals for the Eighth Circuit in early 2005,[86] however, and in November 2005, the Supreme Court refused to hear the challenge to the law.[87] Nevertheless, given the ever-increasing number of sex offender laws, the Supreme Court will likely soon consider the issue of residency restrictions.

B. Global Positioning System Monitoring.

Proponents of better sex offender monitoring also advocate for bills that support global positioning system monitoring of sex offenders.[88] "Currently, 23 states use GPS to monitor some sex offenders while they're on parole,"[89] but new legislation and trial programs support the use of GPS devices to track high-risk offenders even after parole.[90] Based upon the fear that "'a high percentage of sex offenders will reoffend once released from prison,'"[91] supporters of GPS monitoring believe that if they are able to track sex offenders, they "'may be able to deter them from future attacks.'"[92]

The majority of states supporting this legislation focus upon monitoring only their highest-risk or most dangerous sex offenders.[93] Therefore, the GPS monitoring is proposed mostly just for sex offenders "on probation or parole for committing a serious child sex offense . . . those who are found to be sexually violent and placed on supervised release . . . [or] those convicted under federal law or by another state."[94] Under a Minnesota proposal:

> Level 3 offenders, those at the highest risk of committing another sex crime, would be required to wear devices that are monitored 24 hours a day. Those

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[85] *Id.* at 876 (citing Plaintiff's Exhibit 1, at *11).

[86] Doe v. Miller, 405 F.3d 700 (8th Cir. 2005), *cert. denied*, 546 U.S. 1034 (2005).

[87] *Id.*

[88] Katharine Mieszkowski, *Tracking Sex Offenders with GPS*, SALON.COM, Dec. 19, 2006, http://www.salon.com/news/feature/2006/12/19/offenders/index.html.

[89] *Id.*

[90] *Id.*

[91] Gary Delsohn, *Bills Tighten Sex-Offender Tracking*, SACRAMENTO BEE, Aug. 15, 2005, at A3 (quoting Sacramento County District Attorney Jan Scully).

[92] *Id.* (quoting Sacramento County District Attorney Jan Scully).

[93] *See* Assemb. 4107, 211 Leg., Reg. Sess. (N.J. 2005); Assemb. 5420A, Reg. Sess. (N.Y. 2005). *See also* Rummana Hussain, *Emanuel Seeks GPS Bracelets for All Child Sex Offenders; Says $30 Million Plan Would Let Authorities Track Their Every Move*, CHICAGO SUN-TIMES, Aug. 19, 2005, at 24; Jonathan Martin, *GPS Tracking Beset by Problems of Terrain, Technology and Time*, THE SEATTLE TIMES, Sept. 28, 2005, at A16; Carmen Nobel, *State Employs GPS to Track Sex Offenders*, EWEEK, May 16, 2005, at 16; Ellen Perlman, *States and Localities Are Using GPS to Put Moving Targets on the Map*, GOVERNING, Oct. 2005, at 70.

[94] Stacy Forster & Steven Walters, *GPS Bill Passes Assembly; Worst Sex Offenders Would Be Monitored for Life*, MILWAUKEE JOURNAL SENTINEL, Nov. 10, 2005, at B3.

> devices would send positioning information to a central location several times an hour, and that information would be watched all the time.
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> Level 2 offenders, judged slightly less likely to commit new sex crimes, would have to wear either those active devices or systems known as "passive" devices, which gather information throughout the day but send the information to a central monitoring center only when their transmitters are docked in a stationary portal.[95]

Other states, however, such as California, do not differentiate based on probability of recidivism and instead have proposed to "require first-time sex offenders to wear a global positioning device for life so their whereabouts could be tracked."[96]

Generally, GPS devices weigh approximately six ounces, are the size of a computer mouse, and are strapped to the ankle.[97] The "device is waterproof to a depth of 15 feet, allowing for showering, bathing and swimming,"[98] and is also tamper-proof; "[i]f its strap is cut, an alarm will sound, and the police and parole authorities will be notified immediately and given the parolee's location."[99] The device "'monitors, collects and records all movements and location data of every parolee 24/7,'" offering a more dependable way to supervise the offenders.[100] The monitoring device will:

> transmit information at least once a day via e-mail, fax, phone or pager to parole officers or law enforcement officials. In the event of a violation, or if the parolee enters a "hot zone"—an area too close to a playground, for instance—authorities would be immediately notified of the violation and its location. Software will also help authorities match locations and times with crimes that have occurred.[101]

In California, for example, "[t]he Sheriff's Department sends the Department of Corrections information on each day's crimes .... The system matches crime scenes with parolees' locations," and if a parolee was close to the scene, the system notifies the state, theoretically reducing the number of unsolved crimes and increasing police efficiency.[102] While the GPS system cannot stop a sex offender determined to commit a sex crime,[103] "[a]n officer can watch an offender's

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[95] Rachel E. Stassen-Berger, *Satellite Watch Urged for More Sex Offenders; Plymouth Republican Wants Major Expansion of Current Monitoring*, ST. PAUL PIONEER PRESS, Jan. 20, 2006, at 1A.

[96] *See* Delsohn, *supra* note 91, at A3.

[97] *See* Stephanie Ramos, *GPS to Keep Tabs on Sex Offender*, L.A. TIMES, June 21, 2005, at 3.

[98] *Id.*

[99] *Id.*

[100] *Id.* (quoting Todd Sloseck, Cal. Dep't of Corrections spokesman).

[101] *Id.*

[102] Susana Enriquez, *Program Links Crime Scenes, Sex Offenders*, L.A. TIMES, Oct. 29, 2005, at B6.

[103] LAFOND, *supra* note 18, at 46.

movements on a computer, or will be alerted via e-mail, pager or cell phone when an offender violates state law by loitering near a school, a day-care center or the home of a victim."[104] Therefore, GPS monitoring will not only improve parolee monitoring, but will also increase the number of parole violations that are caught and deter future violations.

While promising, GPS monitoring is not flawless; the cost of monitoring sex offenders has the potential to keep states from utilizing the technology. Florida, for example, "spent $3.9 million to put 1,200 released sex offenders on GPS tracking" in 2005.[105] The total estimated daily state expenses for monitoring a sex offender on parole with GPS is almost double that of an ordinary parolee ($9.70), costing the state an additional $8.75.[106] This monitoring appears more efficient than keeping the offender imprisoned, however, which can cost the State $45 per day.[107] To defray cost, some states require offenders to pay for the devices and monitoring expenses;[108] in Michigan, where GPS is already used, the offenders pay about five dollars per day to be monitored.[109] Most states estimate that the annual costs to supervise the highest risk offenders with GPS would be $4.8 to $8.6 million dollars.[110] However, Illinois' one year trial program estimated $500,000,[111] while California's proposed system to monitor all sex offenders has an estimated annual cost of over half a million dollars.[112]

Proponents of the GPS monitoring believe the high costs are justified because they believe GPS monitoring will protect children. They argue that "in the event of a child abduction, sexual assault or similar offense, the authorities could immediately begin closing in on suspects."[113] Additionally, statistics show that nearly twenty percent of sex offenders' current addresses are unknown; officials do not know where 150,000 out of 550,000 total registered sex offenders are located.[114] Homeless offenders pose another concern. Most states require public notification when an offender moves into a neighborhood, but there is no notification procedure for homeless offenders.[115] Additionally, GPS devices prove "where they have been, [and so] these devices can also clear sex offenders of

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[104] Paul Hampel, *Satellites Will Help Track Sex Offenders; Illinois Will Try Out System Using Global Positioning Technology*, ST. LOUIS POST-DISPATCH, July 7, 2005, at A1.

[105] *Id.*

[106] Enriquez, *supra* note 102, at B6.

[107] Jennifer Lee, *Putting Parolees on a Tighter Leash*, N.Y. TIMES, Jan. 31, 2002, at G1.

[108] Paul Bartels, *Sex-offender GPS Tracking Proposed; Parish Council Will Consider Idea*, THE TIMES-PICAYUNE, Aug. 27, 2005, at 1.

[109] Yashekia Smalls, *Sex Offender Alerts Arrive Via E-mail; State to Track Offenders with GPS*, SOUTH BEND TRIBUNE, Dec. 31, 2006, at B1.

[110] Forster & Walters, *supra* note 94, at B3.

[111] *See* Hampel, *supra* note 104, at A1.

[112] Delsohn, *supra* note 91, at A3.

[113] Bartels, *supra* note 108, at 1.

[114] Hugh Son, *Pol: Wire All Pervs. Law Would Put GPS on Repeat Sex Offenders*, N.Y. DAILY NEWS, Aug. 4, 2005, at 1.

[115] Hoppin, *supra* note 2, at 1A.

suspicion if children are reported missing or if a sex crime has been committed."[116]

The GPS devices are not infallible.[117] They "may not always work when the offender is in a building, an area surrounded by tall buildings, or certain rural areas,"[118] "or in wooded areas."[119] Also, the devices are expensive to replace if broken or destroyed,[120] and the tracking itself is quite costly: some states claim that the tracking "requires too much staffing to be feasible."[121]

GPS tracking offers better monitoring of paroled sex offenders than the traditional parole system, but the program still causes concerns. Sex offender laws and rehabilitation have not yet eradicated recidivism, but GPS laws seem likely to help: a 2004 Florida Department of Corrections comparison study found that "3.8% of offenders tracked with GPS committed a new felony within two years, compared with 7.7% of those supervised without it."[122] Their use, however, will depend on whether their invasiveness can be justified constitutionally.

IV. CONSTITUTIONAL CHALLENGES: EX POST FACTO, SUBSTANTIVE AND PROCEDURAL DUE PROCESS, AND RATIONAL BASIS ARGUMENTS APPLIED TO RESIDENCY RESTRICTIONS AND GPS TRACKING.

In addition to dealing with concerns that new generation sex offender laws might not work as intended, lawmakers must determine whether these measures are effective or whether they just add to the amalgam of laws already in place.[123] Sex offender laws have been challenged in the courts under innumerable legal doctrines alleging: unreasonable search and seizure,[124] double jeopardy,[125] cruel and unusual punishment,[126] invasion of privacy, ex post facto,[127] and violation of equal protection,[128] substantive[129] and procedural due process.[130] No argument, thus far,

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[116] LAFOND, *supra* note 18, at 215.

[117] Perlman, *supra* note 93, at 70.

[118] Lee, *supra* note 107, at G1.

[119] Perlman, *supra* note 93, at 70.

[120] *Id.*

[121] Martin, *supra* note 93, at A16.

[122] Wendy Koch, *More Sex Offenders Tracked by Satellite; Wisconsin Joins Nearly 2 Dozen States in Using GPS Monitoring*, USA TODAY, June 7, 2006, at 3A.

[123] Kelly Brewington, *Sex Offenders the Target of Legislators, Candidates; Lawmakers Are Set to Debate Punishment and Tracking Today*, BALTIMORE SUN, Jan. 19, 2006, at 1B.

[124] Doe v. Poritz, 662 A.2d 367 (N.J. 1995).

[125] Byron M. v. Whittier, 46 F. Supp. 2d 1032, 1035–36 (C.D. Cal. 1998); *Poritz*, 662 A.2d 367.

[126] People v. Leroy, 828 N.E.2d 769, 784 (Ill. App. Ct. 2005); State v. Seering, 2003 WL 21738894, at *13–14 (Iowa Dist. Ct. Apr. 30, 2003).

[127] *Seering*, 2003 WL 21738894, at *10–12; Smith v. Doe, 538 U.S. 84 (2003).

[128] *Leroy*, 828 N.E.2d at 778; *Poritz*, 662 A.2d at 413–15.

[129] Doe v. Moore, 410 F.3d 1337 (11th Cir. 2005); *Leroy*, 828 N.E.2d at 776–77; *Seering*, 2003 WL 21738894, at *4–9.

[130] *Leroy*, 828 N.E.2d at 778; *Seering*, 2003 WL 21738894, at *9–10.

has succeeded in completely invalidating a sex offender law.[131]

Prior analysis suggests that residency restrictions likely survive substantive due process challenges and may or may not survive Ex Post Facto Clause challenges.[132] The permissibility of residency restrictions is not yet wholly determined, while the constitutionality of GPS monitoring of sex offenders has yet to come before the court. Applying ex post facto, procedural and substantive due process, and equal protection analysis to the new sex offender legislation, it is apparent that GPS monitoring is constitutional and residency restrictions are not.

A. GPS Monitoring Is Constitutional Under the Ex Post Facto Clause; However, Deterrence Purposes of Residency Restrictions Do Not Outweigh the Law's Excessive Impact.

Article I, Sections 9 and 10 of the United States Constitution prohibit the States from passing any "ex post facto Law,"[133] ensuring that its citizens know "in advance what conduct is criminal and what penalties they face if they commit those crimes."[134] To violate the Ex Post Facto Clause, a law must increase punishment "beyond what was prescribed when the crime was consummated, [and] the penal provision must be both retrospective and more onerous than when the offender committed the criminal act."[135] A statutory change that creates a hardship for an individual does not necessarily mean that it violates the Ex Post Facto Clause.

According to *Lynce v. Mathis*, a law violates the Ex Post Facto Clause when it is retrospective, applying to crimes committed before its enactment and increasing the severity of the punishment.[136] Any blanket law imposed on all previous sex offenders is retrospective, and so only the second element of the *Lynce* analysis might apply, i.e., whether the Act disadvantages affected offenders by increasing punishment for crimes committed before the Act's establishment.[137]

To determine whether the laws punish sex offenders, it must first be "ascertain[ed] whether the legislatures intended the statute to establish 'civil' proceedings" or criminal, punitive action.[138] Upon examination,

> [i]f the intention of the legislature was to impose punishment, that ends the inquiry. If, however, the intention was to enact a regulatory scheme that is

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[131] *See* Doe v. Poritz, 662 A.2d 367, 380 (N.J. 1995).

[132] Hobson, *supra* note 29, at 994; Daniel L. Feldman, *The "Scarlet Letter Laws" of the 1990s: A Response to Critics* , 60 ALB. L. REV. 1081, 1119 (1997).

[133] U.S. CONST. art. I, §9, §10.

[134] LAFOND, *supra* note 18, at 96.

[135] *See* TERRY & FURLONG, *supra* note 38, at I-20 (citing Doe v. Pataki, 919 F. Supp. 691, 699 (S.D.N.Y. 1996) (*Pataki I*)).

[136] Lynce v. Mathis, 519 U.S. 433, 441 (1997) (quoting Weaver v. Graham, 450 U.S. 24, 30 (1981) and citing Collins v. Youngblood, 497 U.S. 37, 50 (1990)).

[137] Cutshall v. Sundquist, 193 F.3d 466, 476 (6th Cir. 1999).

[138] Smith v. Doe, 538 U.S. 84, 92 (2003) (quoting Kansas v. Hendricks, 521 U.S. 346, 361 (1997) (internal quotations omitted)). *See also* TERRY & FURLONG, *supra* note 38, at I-23.

civil and nonpunitive, we must further examine whether the statutory scheme is "'so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.'"[139]

The courts most widely use the *Mendoza-Martinez* seven-factor test to determine whether a statute is punitive.[140] "While these factors are 'neither exhaustive nor dispositive,' they are 'useful guideposts'"[141] in this constitutional analysis, considering:

(1) Whether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as a punishment; (3) whether it comes into play only on a finding of scienter; (4) whether its operation will promote the traditional aims of punishment—retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned . . . .[142]

Not every factor may pertain to the statute in question, so they may be applied selectively in order to determine the statute's punitive qualities.[143] The *Smith v. Doe* court used five factors,[144] considering, however, that "the ultimate question always remains whether the punitive effects of the law are so severe as to constitute the 'clearest proof' that a statute intended by the legislature to be nonpunitive and regulatory should nonetheless be deemed to impose *ex post facto* punishment."[145]

1. Residency Restrictions Do Not Satisfy the Elements of the *Mendoza-Martinez* Test and Are thus Unconstitutional.

Residency restrictions pose "an affirmative disability or restraint,"[146] which fulfills the first factor of the Mendoza-Martinez test. Restraint is generally defined as "[c]onfinement, abridgment, or limitation."[147] When the restraint is minor or

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[139] *Id.* (quoting United States v. Ward, 448 U.S. 242, 248–49 (1980)).

[140] *See* TERRY & FURLONG, *supra* note 38, at I-23.

[141] Michael J. Duster, *Out of Sight, Out of Mind: State Attempts to Banish Sex Offenders*, 53 DRAKE. L. REV. 711, 730 (2005) (quoting United States v. Ward, 488 U.S. 242, 249 (1980); Hudson v. United States, 522. U.S. 93, 99 (1997)).

[142] *See* Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–69 (1963) (emphasis removed).

[143] *Smith*, 538 U.S. at 97.

[144] *See id.* (applying the following five factors to that purpose: whether statute imposes an affirmative disability or restraint, whether the law has been regarded in our history and traditions as punishment, whether it imposes the traditional aims of punishment, whether it has a rational connection to a nonpunitive purpose, and whether it is excessive with respect to that purpose).

[145] Doe v. Miller, 405 F.3d 700, 719 (8th Cir. 2005) (emphasis in original).

[146] *Mendoza-Martinez*, 372 U.S. at 168–69.

[147] BLACK'S LAW DICTIONARY 1340 (8th ed. 2004). *See also* Duster, *supra* note 141, at 731.

indirect, however, it is generally not considered to constitute punishment.[148] However, when applied to residency restrictions, the restraint imposed is neither minor nor indirect.[149] By banning sex offenders from living or passing within expansive circumferences of schools, parks, and day-care centers, states are effectively zoning entire cities and towns as "no sex offenders allowed" areas. Not only are sex offenders prevented from living in many locations, but these laws also impede an individual's ability to travel, work, and live. Although there is "no fundamental right to a 'specified' or 'specific kind' of housing," because of these laws, individuals "are made to move, to face a continual denial of [housing,] and to basically live in fear of becoming homeless . . . ."[150] This invasion upon housing, travel, and liberty rights is not minor or indirect; rather, it impermissibly restrains an individual's rights under the first factor of the test.

Residency restrictions are traditionally and historically considered punishment in the United States,[151] satisfying the second factor of the test. Historically, "[b]anishment was a weapon in the English legal arsenal for centuries, but it was always 'adjudged a harsh punishment even by men who were accustomed to brutality in the administration of criminal justice.'"[152] Since the residency restrictions essentially "banish" sex offenders from not only areas of towns, but entire towns and cities, the laws satisfy this factor.

Additionally, the laws' "operation will promote the traditional aims of punishment,"[153] meeting the retribution and deterrence factor of the *Mendoza-Martinez* test.[154] A provision is considered to be imposing a penalty "as a deterrent and punishment of unlawful conduct" when the additional burden is imposed because of an individual's violation of the law and the burden is "grossly disproportionate" to the rights of the individual prior to the enactment of the statute.[155] Residency restrictions are grossly disproportionate to an individual's rights: sex offenders are required to register with state law enforcement frequently, and depending on their level of dangerousness, the community is sometimes notified if a sex offender moves into the neighborhood. Blocking off access to entire towns and cities, however, are penalties that are grossly disproportionate to what sex offender's rights were prior to the enactment of the statute, serving the purposes of deterrence and retribution.

While residency restrictions have a rational connection to a nonpunitive purpose,

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[148] Duster, *supra* note 141, at 731 (quoting *Smith*, 538 U.S. at 100).

[149] *See* People v. Leroy, 828 N.E.2d 769, 781 (Ill. App. Ct. 2005) (finding that residency restrictions are neither minor nor indirect restraints).

[150] Brief of Plaintiff-Appellant at 11, Doe v. Moore, No. 03-10279 (11th Cir. Apr. 29, 2004).

[151] *Smith*, 538 U.S. at 97.

[152] Kennedy v. Mendoza-Martinez, 372 U.S. 144, 170 n.23 (1963) (quoting David W. Maxey, *Loss of Nationality: Individual Choice or Government Fiat?*, 26 ALB. L. REV. 151, 164 (1962) (internal citations omitted)).

[153] *Id* at 168.

[154] *Id.*

[155] United States v. Constantine, 296 U.S. 287, 295 (1935).

the "most significant factor" to consider under the *Mendoza-Martinez* test[156] is whether the states are "excessive with respect to this [nonpunitive] purpose."[157] While the "*Ex Post Facto Clause* does not preclude a State from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences,"[158] it is also important to consider that presently, no studies prove a correlation between a sex offenders' residence and their recidivism.[159] As the residency restrictions effectively criminalize a sex offenders' mere presence in many areas of the nation, "[s]uch a result is excessive when compared to the State's nonpunitive purpose of enhancing public safety."[160] Using the *Mendoza-Martinez* factors, residency restrictions should be found violative of the Ex Post Facto Clause since they constitute disabling punishment, and while they serve a rational purpose, the restrictions are too excessive in regard to that purpose.

2. Because Its Infringement Is Relatively Minor In Comparison With the Laws' Overarching Purpose, GPS Monitoring Is Constitutional Under the Ex Post Facto Clause.

Applied to GPS devices, however, the *Mendoza-Martinez* factors should not find monitoring a violation of the Ex Post Facto Clause. Wearing a GPS device is cumbersome and constitutes an "affirmative disability." [161] However, despite the loss of privacy, wearing the device itself is an abridgment that is minor and indirect, and therefore, "unlikely to be punitive."[162] Since "'[t]he Act imposes no physical restraint . . . [it] does not resemble the punishment of imprisonment, which is the paradigmatic affirmative disability or restraint.'"[163] Therefore, GPS devices permissibly intrude upon an individual's rights under the first factor of the *Mendoza-Martinez* test.

Additionally, the court should not find that GPS monitoring "has been regarded in our history and traditions as a punishment."[164] History has not long had the ability or man-power to track an individual for an extensive period of time, but as a condition of parole, the GPS laws permit states to track and monitor offenders. The devices themselves are not particularly intrusive, and while they permit law enforcement to monitor offenders, this tracking ability does not constitute punishment beyond general parole and so does not satisfy the second factor. Also, while GPS monitoring promotes "the traditional aims of punishment" of retribution

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[156] *Smith*, 538 U.S. at 97 (citing United States v. Ursery, 518 U.S. 267, 290 (1996)).

[157] State v. Seering, 2003 WL 21738894, at *12 (Iowa Dist. Ct. Apr. 30, 2003).

[158] *Smith*, 538 U.S. at 103–04 (emphasis in original).

[159] *Seering*, 2003 WL 21738894, at *12.

[160] *Id.*

[161] Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–69 (1963).

[162] *Smith*, 538 U.S. at 100.

[163] People v. Wallace, 120 Cal. App. 4th 867, 877 (Cal. Ct. App. 2004) (quoting *Smith*, 538 U.S. at 99–100).

[164] *Smith*, 538 U.S. at 97.

and deterrence—the third relevant factor of the *Mendoza-Martinez* test—it is unlikely that GPS laws will be considered so grossly disproportionate a burden on the rights of the sex offender that they would fail to meet this factor.[165] While GPS monitoring devices are imposed because of a sex offender's status as such, it is difficult to ascertain whether the burdens are "grossly disproportionate" given the passive nature of the GPS monitoring as compared to societal fear of the offenders.

While the Court could deem the requirement of wearing a GPS device a penalty, the wearing of a device is arguably not a gross imposition or burden upon an individual as it solely serves to provide police with the individual's location. If an individual was tracked within an area where a crime occurred, it surely is an imposition upon the individual that the police will likely interrogate him. However, the burden that this places upon the offender is far surpassed by society's interest in preventing these crimes. Thus, comparatively, GPS monitoring does not constitute a gross imposition upon the offender.

Whether the laws have a rational connection to a nonpunitive purpose is the fourth inquiry in the test and is the "most significant factor" to consider.[166] GPS monitoring satisfies this factor since its purpose is to prevent sexual offenses and more efficiently monitor sex offenders.[167] Despite this nonpunitive purpose, the fifth factor of the *Mendoza-Martinez* test asks whether the statutes are "excessive with respect to this purpose;"[168] a suit is already pending in the U.S. District Court for the Central District of California alleging that lifetime monitoring is excessive.[169] Because GPS devices serve the deterrence purpose fairly unobtrusively and eliminate offenders as crime suspects based upon geographic location, the GPS laws are not excessive with regard to preventing sex offenses and improving parole monitoring. Therefore, the *Mendoza-Martinez* test does not show the GPS laws to violate the Ex Post Facto Clause.

The *Mendoza-Martinez* test to determine whether a statute constitutes punishment shows that residency restrictions violate the Ex Post Facto Clause of the Constitution while GPS laws do not. The residency law imposes heavy restraints upon individuals and has been regarded as a great burden throughout history. Additionally, the residency proscription serves the purposes of retribution and deterrence, and while the law is rationally related to public safety, it is overwhelmingly excessive with respect to that purpose.

B. Residency Restrictions Violate Substantive Due Process when Balancing Prevention Interest, Effectiveness of the Law, and the Privacy Interest Intrusion, but GPS Devices Do Not and Should Therefore Be Upheld.

Past challenges to sex offender laws based upon substantive due process claims

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[165] United States v. Constantine, 296 U.S. 287, 295 (1935).

[166] *Smith*, 538 U.S. at 97 (citing United States v. Ursery, 518 U.S. 267, 290 (1996)).

[167] *Id.*

[168] State v. Seering, 2003 WL 21738894, at *12 (Iowa Dist. Ct. Apr. 30, 2003).

[169] Katharine Mieszkowski, *Tracking Sex Offenders with GPS*, SALON.COM, Dec. 19, 2006, http://www.salon.com/news/feature/2006/12/19/offenders/index.html.

have usually failed; however, this new generation of laws may provide an exception. The Fourteenth Amendment to the United States Constitution prohibits states from "depriv[ing] any person of life, liberty, or property, without due process of law;"[170] "the essence of substantive due process is protection from arbitrary and unreasonable action."[171] The Wyoming Supreme Court inquired whether the law provides "a reasonable and appropriate means for achieving [the] purpose" and whether the act is a "valid exercise of police power" to protect the "safety and general welfare of the people."[172] If a valid liberty interest—"another way of describing substantive due process"—were violated, the court must then examine whether the statute was a reasonable and appropriate way to achieve the purpose of protecting the public safety.[173] The government's overriding concern about public welfare, however, makes plaintiff's substantive due process arguments difficult to win.

The Supreme Court, in *Brown v. Texas*, provided a test to determine the infringement upon substantive due process pertaining to privacy.[174] The Court balances the state's interest in prevention, the effectiveness of the law's actions, and the level of intrusion on an individual's privacy caused by the law's actions.[175] To resolve "conflicts between the government's need for information and the individual's right of confidentiality . . . 'even if the governmental purpose is legitimate and substantial . . . the invasion of the fundamental right of privacy must be minimized by utilizing the narrowest means possible to achieve the public purpose.'"[176]

While "[t]he Constitution does not explicitly mention any right of privacy . . . the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution."[177] "First the Court should determine whether there exists a liberty . . . interest which has been interfered with by the state."[178]

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[170] U.S. CONST. amend. XIV, § 1.

[171] *See* TERRY & FURLONG, *supra* note 38, at I-51 (citing BLACK'S LAW DICTIONARY 1281 (5th ed. 1979)).

[172] Snyder v. State, 912 P.2d 1127, 1132 (Wyo. 1996).

[173] *See* TERRY & FURLONG, *supra* note 38, at I-51.

[174] Brown v. Texas, 443 U.S. 47, 50–51 (1979).

[175] *See id.*

[176] Doe v. Poritz, 662 A.2d 367, 412 (N.J. 1995) (quoting Lehrhaupt v. Flynn, 356 A.2d 35, 42–43 (N.J. 1976)).

[177] Roe v. Wade, 410 U.S. 133, 152 (1973) (referencing the First, Fourth, Fifth, and Ninth Amendments, the penumbras of the Bill of Rights, and the liberty concept in the first section of the Fourteenth Amendment).

[178] Valmonte v. Bane, 18 F.3d 992, 998 (2d Cir. 1994).

1. The Liberty Interest an Individual Holds in the Right to Establish a Home Outweighs the Government's Interest, Especially Given that the Effectiveness of Residency Restrictions is Wholly Unknown.

"The right to 'establish a home' has long been cherished as one of the fundamental liberties embraced by the Due Process Clause."[179] Therefore, being rendered homeless or being banished from a town that one lives in constitutes the serious frustration of that right. Since residency restrictions are spreading across the nation and increasing in severity (i.e., greater distances a sex offender must live from a landmark), it appears possible that, in a few years, whole sections of states and perhaps, the country, will bar sex offenders from living within their borders.

Courts are beginning to reject blanket laws, such as residency restrictions, that create "an irrebuttable presumption that once a party was convicted of certain enumerated felonies, said party was disqualified from" being allowed within a specific setting.[180] In rejecting the blanket preclusion, the U.S. District Court for the Southern District of Florida stated that enveloping all felons under a severe blanket restriction "wholly rejects [and discourages] fundamental concepts germane to our system such as penitence, rehabilitation, and motive to do well."[181] The court added that this "somewhat Draconian legislation" was in response to recent societal child care problems noting that, "as is often the case where well-intentioned legislation is not carefully considered, the constitutional rights of some may be abridged."[182]

Without studies to prove that the residences of sex offenders correlate with their recidivism rates, such blanket provisions, even if based upon Tier-level, unconstitutionally invade sex offender's substantive due process liberty rights and right to property and should be held unconstitutional on substantive due process grounds. If the *Brown v. Texas* balancing test[183] is applied, the effectiveness of the laws' actions are too unknown to allow the incredible intrusion upon a sex offender's substantive due process rights despite the fact that the government has a significant interest in the prevention of sexual offenses.

2. Since the Intrusion Supplied by GPS Monitoring Is Relatively Minor in Comparison to the Potential Effectiveness of the Measure and the Government's Interest, it is Constitutional Under Substantive Due Process Analysis.

A substantive due process argument, when applied to GPS devices, shows that GPS monitoring laws should be upheld as constitutional. The *Brown v. Texas* test balances the state's prevention interest, the law's effectiveness, and the intrusion

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[179] City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 461 (1985) (Marshall, J. concurring and dissenting) (citing Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

[180] Brief of Plaintiff-Appellant, *supra* note 150, at 21 (citing Fewquay v. Page, 682 F. Supp. 1195 (S.D. Fla. 1987)).

[181] *Fewquay*, 682 F. Supp. at 1198.

[182] *Id.*

[183] Brown v. Texas, 443 U.S. 47, 50–51 (1979).

upon an individual's privacy.[184] While a state has a strong interest in preventing sex offender recidivism and sex offenses from occurring, being watched and recorded every day for a lifetime is an enormous intrusion upon that individual's fundamental right of privacy. However, the third factor in the balancing test considers the effectiveness of the law's actions, and while the effectiveness of GPS tracking is relatively unknown, it is a promising and fairly unobtrusive measure.[185] Therefore, while residency restrictions should be found unconstitutional under a substantive due process argument, the court should find that a GPS device is a reasonable and appropriate way to maintain public welfare and that a substantive due process claim should fail pertaining to this privacy interest.

C. Residency Restrictions Violate Procedural Due Process Rights; Government Interest Outweighs Private Interest in GPS Devices, Making GPS Monitoring Constitutional.

The Fourteenth Amendment's Due Process Clause generally entitles an individual to "notice of the proposed government action, a hearing before a neutral decision maker, the right to present evidence and to cross-examine the government's evidence, and the assistance of a lawyer."[186] "Those who seek to invoke its procedural protection must establish that" one was deprived of life, liberty, or property.[187] Two questions are therefore pertinent to a procedural due process analysis: first, whether the State interfered with a liberty or property interest, and second, whether the procedures resulting in the deprivation of the interest were constitutionally sufficient.[188] To determine how much process a plaintiff is due, the Supreme Court enumerated a three-factor test to evaluate administrative procedures by examining: (1) the private interest to be affected by the action; (2) the risk of erroneous deprivation of that interest through the action and the probable value of additional safeguards; and (3) the government's interest.[189]

1. Under the *Mathews v. Eldridge* Balancing Test, Residency Restrictions are Unconstitutional.

Most courts ruling on procedural due process challenges to sex offender laws uphold registration statutes because the only liberty interest offered was reputation.[190] The reputation liberty interest at stake is great, considering that both

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[184] *Id.*

[185] *See* Michele McPhee, *Menino Wants GPS Eye on Gun Crime Suspects*, BOSTON HERALD, Feb. 15, 2006, at 4.

[186] LAFOND, *supra* note 18, at 98.

[187] Wilkinson v. Austin, 545 U.S. 209, 221 (2005).

[188] Bazzetta v. McGinnis, 423 F.3d 557, 563 (6th Cir. 2005) (quoting Ky. Dep't of Corr. v. Thompson, 490 U.S. 454, 460 (1989)).

[189] Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976) (citing Goldberg v. Kelly, 392 U.S. 254, 263–71 (1970)).

[190] Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1, 6–7 (2003) (citing Paul v. Davis, 424

the erroneous application of residency restrictions—forcing someone to move out of an area or avoid a town—and the small, yet visible, GPS monitors are still reputation-scarring. However, "loss of reputation must be coupled with some other tangible element in order to rise to the level of a protectible liberty interest."[191] Most courts hold that "mere injury to reputation, even if defamatory, does not constitute the deprivation of a liberty interest."[192]

A minority of courts, however, have identified protectible liberty interests not only in reputation but also in privacy, thus triggering the right to due process.[193] In New Jersey, procedural due process requires that the State "provide notice and an opportunity to be heard before an offender is classified as a moderate or high-risk offender;"[194] Oregon and Massachusetts courts have found similarly.[195]

Additionally, residency restrictions banning sex offenders from traveling within their limits violate the fundamental right to travel. The Supreme Court has recognized that "[t]he constitutional right to travel from one State to another" is fundamental.[196] Although "the Supreme Court has . . . declined to address . . . whether the right to intrastate travel is fundamental,[197] "[t]he First, Second, Third, Fifth and Ninth Circuits all recognize a fundamental right to intrastate travel."[198] Since "[f]reedom of movement generally is associated with the fundamental right to travel,"[199] it makes sense that "whether an individual travels across many states or a single county, the right to be free to enter, leave, or remain in a place and to be treated as an equal with current denizens, is a fundamental liberty guaranteed by our constitution."[200] Therefore, residency restrictions implicate the right to travel and the liberty rights of privacy and reputation, whereas GPS monitoring involves solely the liberty rights of privacy and reputation.

The second step in procedural due process analysis, determining the level of process that is due for these rights, requires the application of the *Mathews* three-factor test. The *Mathews* test examines the private interest affected, the risk of

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U.S. 693 (1976)).

[191] Valmonte v. Bane, 18 F.3d 992, 999 (2d Cir. 1994).

[192] Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1, 6–7 (2003) (citing Paul v. Davis, 424 U.S. 693 (1976)).

[193] *See* LAFOND, *supra* note 18, at 98.

[194] *Id.* at 98–99 (citing Doe v. Poritz, 662 A.2d 367, 420–21 (N.J. 1995)).

[195] *See id.* (citing Doe v. Sex Offender Registry Bd., 697 N.E.2d 512 (Mass. 1998); Noble v. Bd. of Parole, 964 P.2d 990 (Or. 1998)).

[196] United States v. Guest, 383 U.S. 745, 757 (1966).

[197] Brief of Plaintiff-Appellant, *supra* note 150, at 39 (citing City of Chicago v. Morales, 527 U.S. 41 (1999).

[198] *Id.* (citing Nunez v. City of San Diego, 114 F.3d 935, 944 (9th Cir 1997); Qutb v. Strauss, 11 F.3d 488, 492 (5th Cir. 1993); Lutz v. City of York, 899 F.2d 255, 261 (3d Cir. 1990); King v. New Rochelle Mun. Hous. Auth., 442 F.2d 646, 648 (2d Cir. 1971); Cole v. Hous. Auth. of Newport, 435 F.2d 807, 811 (1st Cir. 1970)).

[199] Gary v. City of Warner Robins, 311 F.3d 1334, 1338 (11th Cir. 2002) (citing Kent v. Dulles, 357 U.S. 116, 125 (1958)).

[200] Doe v. Miller, 298 F. Supp. 2d 844, 874 (S.D. Iowa 2004).

erroneous deprivation of that interest compared to the value of additional safeguards, and the government's interest.[201] Applied to residency restrictions, while the government has a recognizable interest in protecting society from sexual predators, it is difficult to see how that interest can outweigh the importance of the interests of privacy, reputation, and the right to travel. This balancing test becomes even clearer when the risk of erroneous deprivation of these liberties is considered; it is implausible to think that an individual would not sustain a substantial loss if they lost their job because they could no longer drive to work or were forced to move. No matter the safeguards in place, the intrusion upon these rights is too great to mend; the measures are simply too punitive.

2. Given that a GPS Device is a Fairly Minor Intrusion, a Sex Offender's Private Interest is not Likely Affected Impermissibly.

Despite the presence of a private interest, the application of the *Mathews* balancing test to the GPS devices does not render an obvious procedural due process violation. The liberty interests of privacy and reputation are important to every United States citizen; however, the government's interest, when combined with the erroneous risk of deprivation of these rights, surpasses the private interests. Because the GPS monitors are small and generally do not pose an intrusion on daily life (other than the inconvenience of wearing them), the damage to reputation and privacy rights is likely to be minimal. Since sex offenders wearing these devices would be on supervised parole, their privacy rights are already limited because they are under supervision. The requirement, then, that an offender wear the device does not add substantially to the injury to reputation and privacy rights. Even if a sex offender's rights were erroneously infringed, wearing a fairly unobtrusive device until the error is rectified is not a considerably substantial infringement.

When subjected to the *Mathews* test balancing test, the reputation, privacy, and travel interests affected, as well as the risk imposed by their erroneous deprivation, make it clear that residency restrictions do not provide sex offenders with sufficient procedural due process. Balanced against the government's interest to protect against such offender, the intrusion upon these rights is simply too great. GPS monitoring however, provides sex offenders with satisfactory procedural due process. Balancing the encroachment upon the privacy and reputation rights affected by GPS monitoring with the government's interest, considering the risk of erroneous deprivation of those rights, the *Mathews* test proves GPS monitoring constitutional. The government's interest in these laws is always substantial; to satisfy the test, however, the laws must not too greatly breach a sex offender's rights and interests: GPS monitoring laws do not.

[201] *See supra* note 189 and accompanying text.

D. If Subject to Rational Basis Scrutiny, Both Sex Offender Laws Should Survive an Equal Protection Argument; However, if Strict Scrutiny Were Applied, Sex Offender Laws Would Be Found Unconstitutional.

The Fourteenth Amendment to the Constitution mandates that no State shall "deny to any person within its jurisdiction the equal protection of the laws;"[202] therefore, "a state may not treat one class of people differently from another class without a legally acceptable rationale."[203] Generally, courts uphold legislation as valid if the statute's classification is "rationally related to a legitimate state interest."[204] Courts employ strict scrutiny when "a statute classifies by race, alienage, or national origin," and intermediate scrutiny when a statute classifies by gender because "[t]hese factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy."[205]

Courts will generally not extend a heightened level of scrutiny to sex offenders because they are not a suspect or quasi-suspect class.[206] Thus, sex offender laws would be subject to rational basis scrutiny, requiring only that the laws "be rationally related to legitimate government interests,"[207] a very low standard that the laws should satisfy.

Despite the Supreme Court's unmoving suspect classifications, however, many state courts allow "strict scrutiny of a legislative classification . . . when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class."[208] To determine whether a class is suspect, the Court asked whether the class is "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."[209] "When the statute under consideration affects a fundamental right or discriminates against a suspect class, courts will subject the legislation to strict scrutiny and uphold it only if it serves a compelling State interest."[210] While sex offenders have not endured the long history of prejudicial treatment that minorities have, nor are they necessarily a "discrete and insular" group,[211] under the straight definition of classes requiring strict scrutiny, sex offenders arguably compose a suspect class deserving strict scrutiny.

A statute will survive a strict scrutiny inquiry only "if it is narrowly tailored to

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[202] U.S. CONST. amend. XIV, § 1.

[203] LAFOND, *supra* note 18, at 98.

[204] City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440–41 (1985).

[205] *Id.* at 440.

[206] Artway v. Attorney General, 81 F.3d 1235, 1267 (3d Cir. 1996).

[207] Washington v. Glucksburg, 521 U.S. 702, 728 (1997).

[208] Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 312 (1976).

[209] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

[210] People v. Esposito, 521 N.E.2d 873, 877 (Ill. 1988).

[211] United States v. Carolene Prods. Co., 304 U.S. 144, 152–53, n.4 (1938).

serve a compelling government interest."[212] Four factors are considered in determining whether a statute is narrowly tailored, including the extent to which: (1) the individuals to whom the law pertains are particularly advantaged or burdened; "(2) the legitimate expectancies of others are frustrated or encumbered; (3) the order interferes with other valid state or local policies; and (4) the order contains (or fails to contain) built-in mechanisms which will, if time and events warrant, shrink its scope and limit its duration."[213]

Sex offenders, the individuals affected by the laws, are specially encumbered by the laws, satisfying the first element.[214] Additionally, a sex offenders' legitimate expectation of rights are significantly frustrated by these laws as both GPS monitoring and residency restrictions encumber privacy and reputation rights.[215] Residence restrictions also infringe upon an individual's right to travel and maintain housing; thus, the second factor is also met. Also, the laws fail to contain "built-in mechanisms" that, if merited, permit the law's effect to diminish absent legislative action. The laws' inability to satisfy this fourth factor is considerably important, even when considering the social benefits of the law. Since there is no demonstrated correlation between sex offender recidivism and the offenders' residences,[216] it seemed unduly burdensome to require sex offenders to leave jobs and homes because of an unjustified, unproven political maneuver to quell societal fear. The third factor, however, is likely satisfied by both residency restrictions and GPS devices considering that policies enacted by state and local communities are consistent in their aims to prevent sexual offenses and have a great interest in doing so.

Pursuant to this reasoning, it is possible, though unlikely, that sex offenders could be considered a group deserving of strict scrutiny. If granted this status, the new sex offender laws would have to be "narrowly tailored to serve a compelling State interest."[217] The government's interest in protecting against sexual predation is clearly strong, but given that residency restrictions intrude so heavily upon sex offenders' rights, they would likely fail strict scrutiny.[218] GPS devices, however, are less limiting on a sex offender, and would survive strict scrutiny analysis.[219]

Since the Supreme Court requires strict scrutiny analysis only for laws focusing upon "discrete and insular" minorities,[220] however, the new sex offender laws would likely undergo only rational basis scrutiny, which they would easily pass.[221] Therefore, an equal protection argument contrary to either law will likely fail. If a

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[212] Virdi v. Dekalb County Sch. Dist., 135 Fed. Appx. 262, 268 (11th Cir. 2005).

[213] Cotter v. City of Boston, 323 F.3d 160, 171 (1st Cir. 2003) (citing Boston Superior Officer Fed'n v. City of Boston, 147 F.3d 13, 20 (1st Cir. 1998)).

[214] *See* discussion *supra* Part IV.C.

[215] *Cotter*, 323 F.3d at 171.

[216] *See supra* note 159 and accompanying text.

[217] Virdi v. Dekalb County Sch. Dist., 135 Fed. Appx. 262, 268 (11th Cir. 2005).

[218] *See* discussion *supra* Part IV.B.1.

[219] *See* discussion *supra* Part IV.B.2.

[220] United States v. Carolene Prods. Co., 304 U.S. 144, 152–53, n.4 (1938).

[221] *See supra* notes 203-07 and accompanying text.

court would be willing to identify the interests that the laws infringe upon as fundamental rights resulting in discrimination, using strict scrutiny rationale, a good equal protection argument could be made against residency restrictions, although GPS devices would likely still be considered constitutional. Since the courts have stuck to their immovable classifications, however, this analysis is unlikely to happen.

V. CONCLUSION.

An increasing number of states are enacting new sex offender laws—residency restrictions and GPS device monitoring—before the Supreme Court gets an opportunity to rule on the constitutionality of either such law.[222] Both laws intrude substantially upon these sex offenders' constitutional rights; traditionally, however, these violations are deemed acceptable when faced with the irrational fear society has of this group. Despite this overarching goal of public safety, residency restrictions should be found unconstitutional and violative of the Fourteenth Amendment's substantive and procedural Due Process Clause and Article I of the Constitution's Ex Post Facto Clause.[223]

Not only are the restrictions unconstitutional and violative of liberty, privacy, and travel interests, but there is also no correlation between a sex offender's residence and his or her recidivism rate.[224] Moreover, the laws drive sex offenders away from treatment, family, and jobs—sources of stability necessary for rehabilitation[225]—and facilitate the ability of a sex offender to recidivate untracked.[226] Therefore, residency restrictions not only violate the Ex Post Facto Clause and substantive and procedural due process rights, but also could have the opposite effect of their purpose—actually making sex offenders harder to track and increasing the number of sex offenses.

GPS monitoring is not only constitutional, however, but also shows promise as a step towards lowering recidivism and sex offenses altogether. The tracking will also decrease the amount of time police spend on a sex offense case since they can eliminate or focus on suspects immediately,[227] a measure with the added benefit of liberating compliant sex offenders from suspicion and questioning.[228] GPS tracking allows invasion upon sex offenders' liberty and privacy rights; however, the laws mandating GPS devices are constitutional under the Ex Post Facto Clause, as well as substantive and procedural due process, and would survive equal protection challenges on either rational basis or strict scrutiny since their actual intrusion upon the individual's rights are far inferior to the societal benefit of reducing sex

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[222] Dahlburg, *supra* note 9, at A13.

[223] *See* discussion *supra* Parts IV.A, IV.B, and IV.C.

[224] State v. Seering, 2003 WL 21738894, at *12 (Iowa Dist. Ct. Apr. 30, 2003).

[225] *See* Worth, *supra* note 1, at B1.

[226] *See* Laurence, *supra* note 4, at 26.

[227] *See* Enriquez, *supra* note 102, at B6.

[228] *See* Hampel, *supra* note 104, at A1.

crimes.[229]

Implementation of laws that work, such as GPS tracking, should be of the utmost importance; legislatures must stop layering on as many laws as are conceivable to appear tough on the issue. Sex offenders are a group that society cannot ignore; however, public outcry has led politicians to strive to win favor by creating more severe and more intrusive laws as quickly as possible. While some laws can strike a balance among government and public interest, functionality, and the preservation of the rights of a sex offender (like GPS laws should), too often these laws serve only the government's interest while falling far short of the other goals. Banishing these persons from society erases the details of their lives and rights, promises no resolution to the offenses, and likely only creates a higher probability of recidivism. The criminal justice system has already forgotten its goal of rehabilitation, but the hope is that society will not refuse even the possibility of offering forgiveness.

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[229] *See* discussion *supra* Parts IV.A.2., IV.B.2., IV.C.2., and IV.D.